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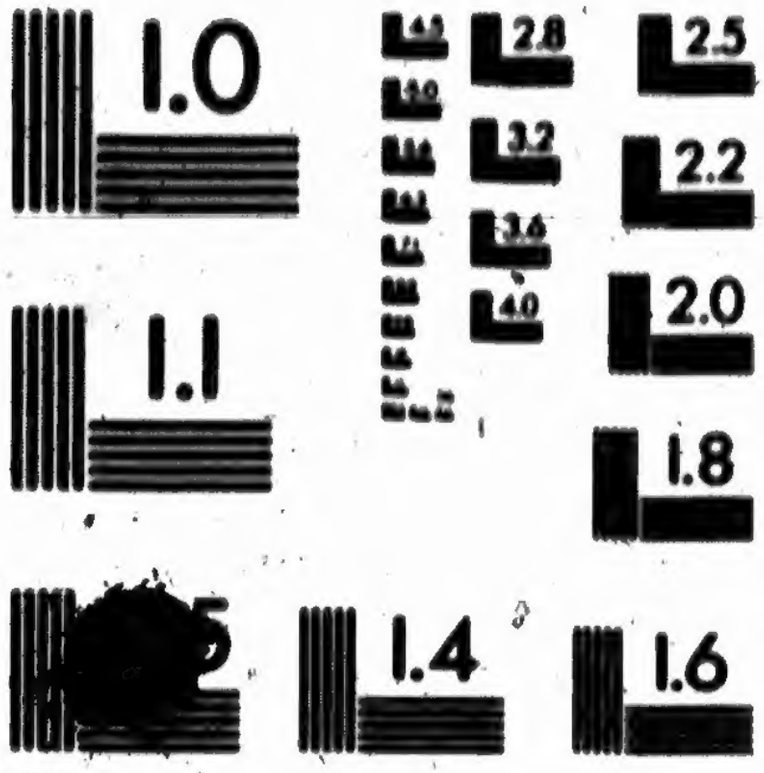

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CASES

ARGUED AND DETERMINED

IN THE COURT OF KING'S

AT

YORK, UPPER CANADA,

IN

EASTER TERM,

IN THE FIFTH YEAR OF GEO. IV.

No. IV.

JUDGES.

THE HON. W. D. POWELL, *Chief Justice.*
THE HON. WILLIAM CAMPBELL.
THE HON. D'ARCY BOULTON.

JOHN B. ROBINSON, Esq. *Attorney General,*
HENRY J. BOULTON, Esq. *Solicitor General.*

BY THOMAS TAYLOR, Es

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1824.

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CASES

ARGUED AND DETERMINED IN THE

COURT OF KING'S BENCH,

YORK, &c.

HAGERMAN *against* SMITH. 1824

Boulton, Solicitor General, had obtained a rule to shew cause why two several sums of £75 0 0 and £19 18 0, should not be deducted from the amount required to be levied under the writs of fieri facias issued in this cause.

Where a debtor is indebted upon two accounts and makes a payment without directing to which account it is to be placed, the creditor has his election to place it to which he pleases unless there is a specific direction for its application or circumstances in the case tantamount to one.

The ground of the application, as stated upon affidavit, was, that the defendant had paid the plaintiff the said sums in part satisfaction of the judgment obtained against him, under the authority of which the fi: fas: had issued. That at the time of defendant's paying the same, the plaintiff did not object to receive the said sums in part satisfaction of the said judgment, or express any wish to apply the same to any other account or demand.

At the time of making these payments,

1824

Hagerman against Smith.

the defendant was indebted to the plaintiff, in other sums upon promissory notes, to account of which the plaintiff had placed these payments, except a small balance which he had placed to the account of the judgment. The plaintiff stated upon affidavit, that when the defendant made these payments, he had not given him any instructions, as to what account they should be placed.

Robinson, Attorney General, shewed cause. He contended, that no instructions having been given to the plaintiff, or any arrangement made as to the account to which the monies paid should be placed, that he was entitled to place the same, to what account he pleased; & relied upon Newmarsh against Clay* and others, and the authorities there referred to. In that case certain acts had taken place which clearly evinced the intention of both parties; but here there was nothing of the kind. The general rule as laid down in the cases, was clear that a creditor might place money paid to him by his debtor, to any account he pleased, unless there was an express stipulation to the contrary, either by words, or acts sufficiently de-

* 14 East 243.

1824

Haferman against Smith.

noting the intention of both parties.

Chief Justice, By the French law a creditor who receives a payment from a person indebted to him upon two accounts must apply it in satisfaction of the most onerous debt; but by the law of England the creditor may make his election, unless the debtor specifically declares at the time of payment, to which account it shall be applied. In this case if the defendant had intended that these payments should have gone in discharge of the judgment, he should have made them to the Sheriff, or taken a special receipt from the plaintiff.

Per curiam—Rule discharged.

April 30th

The declaration at the suit of a Corporation named the individuals composing it, and also described them in their corporate capacities. The breach was in their names as individuals only. The Court held that a non pros might be signed and execution issue against them in their private capacities.

THE HON. G. H. MARKLAND, JOHN KERBY, AND JOHN MACAULEY, Commissioners and Trustees, the Board for settling the affairs of the PRETENDED BANK OF UPPER CANADA, *against* DALTON.

Washburn, on a former day had obtained a rule to shew cause why the judgment of non. pros. for not going to trial, signed in this cause, and the fi. fa. issued thereon against the plaintiffs, should not be set aside for irregularity, on the ground

1824

Markland & others Commissioners, &c. against Dalton.

that the suit having been commenced by them as Commissioners and Trustees under the act of the Provincial Parliament, a nonsuit could not be entered, and execution issued against them, in their private capacities, and he instanced the cases of Bankrupt's assignees, and of Executors.

Boulton, Solicitor General, contra—contended, that the plaintiffs were authorized by the Statute to bring actions as a corporation only, not in their names as individuals, as they have done in this case, which being erroneous they had not chosen to go to trial—that their situation as a corporation, was not analogous to that of executors or assignees of bankrupts, who, notwithstanding their situations as such, must be sued as A. B. and C. D. &c. That the plaintiff's having concluded their declaration without adding the description which they had used in the commencement, was conclusive as to the correctness of the plaintiff's taking out execution in their names as individuals.

Washburn, contra, contended, that these plaintiffs had not sued as individuals, and therefore were not liable to be nonsuited as such; that their names preceeding

1824

Markland & others, Commissioners, &c. against Dalton.

their description, (which was in the very words of the statute appointing them commissioners,) could not alter their character as plaintiffs; and though their description was omitted in the conclusion of the declaration, its having been used in the commencement and throughout, was sufficient to couple it with their names in the conclusion.

Per curiam—Rule discharged.

30th April.

MITCHELL *against* TENBROEK, *one &c.*

Where a bill had been filed against an Attorney in the office of an outer district and proceedings had thereupon to verdict and Judgment, the Court refused to set them aside for irregularity.

The defendant in this case was an Attorney of this court, had been sued by bill and proceeded against to judgment. The bill had been filed in the office of the Clerk of the Crown in the London district, and the subsequent proceedings and verdict, had in that District.

Macauley, had obtained a rule nisi to set these proceedings aside, as being altogether irregular and defective, on the ground that the Bill should have been filed in the principal office at York.

Boulton, Solicitor General, and *Rolph*,

1824

Mitchell against Tetbrock one &c.

shewed cause. They contended, that the words of the statute were sufficiently general, to admit of proceedings being filed against an Attorney in the district office. That an Attorney may waive his privilege altogether, and if the proceeding was incorrect, he has waived it. It is a mere matter of practice. If the defendant had applied at a proper stage of the proceedings to have had the bill filed at York with a view to a trial at bar, or in the Home district, his application might have been attended to; but that after verdict and judgment, it was clearly too late.

Per curiam—Rule discharged.

30th April

MYERS *against* RATHBURN.

The Court permitted an amendment to be made in the address. Cause of action and teste of a writ of Capias.

Upon the application of Macauley.—The Court (upon the authority in 8. T. R. where a writ was amended which had by mistake been made returnable in C B instead of K B) allowed the writ of capias ad respondendum issued in this cause, to be amended by striking out the direction "To William Brown, Constable," and inserting "to the Sheriff of the" by striking

out "in a plea of debt of eighty pounds," and inserting "In a plea of trespass on the case upon promises;" and by striking out "before us this 23d day of February 1824, in the fourth year of our reign" in the teste, and inserting in lieu thereof "Thirty first day of January in the fifth year of our reign."

1824

Myers against Rathbers.

BOULTON *against* RANDALL.

April 30th

In this case, Rolph applied for a rule to shew cause why the proceedings and judgment should not be set aside for irregularity, and why the writ of fieri facias issued upon the said judgment against the lands and tenements of the defendant, should not be superseded with costs, and restitution made to the defendant.

This Court fully recognises the rule of Hilary Term 3rd James 1st which orders that no Cause once argued & determined, shall again be brought before the Court.

A judgment by default had been signed in this case, and execution issued and the lands sold under it several years ago, and an application similar to the present had been made by Stewart of Counsel for the defendant, who, in Michaelmas term 1821, had obtained a rule nisi, but which, upon argument, had been discharged. Various irregularities were upon the present

1824

Boulton against Randall.

application pointed out by Mr. Rolph, some of which had probably not been insisted upon by Mr. Stewart upon the former motion. The Counsel now went considerably at length into all the supposed irregularities, and also read an affidavit (which was filed) containing a statement of those irregularities and of the facts and merits of the applicant's case, adverting also to the partial want of consideration for the debt upon which the judgment was obtained. He also cited many cases of new trials at law and rehearings in equity which he considered as analogous.

Robinson, Attorney General, contra—read an affidavit rebutting those facts and circumstances, but relied upon the universal practice of Courts of law, (to which no one exception could be found) which does not permit a cause once determined upon motion and argument to be again brought forward either upon the ground of the same or other irregularities not before insisted upon. He cited and read the rule of Hilary Term, 3d James 1st, by which it is ordered, "That if any 'cause shall first be moved in court in

'the presence of the counsel of both parties, and the court shall then thereupon order between those parties, if the same cause shall again be moved contrary to that rule so given by the court then an attachment shall go against him who shall procure that motion to be made contrary to the rule of court so first made, and that the counsel who so moves, having notice of the said former rule, shall not be heard here in court in any cause in that term in which that cause shall be so moved contrary to the rule of court in form aforesaid."

The counsel also cited authorities to shew that no motion can be made upon the ground of irregularities not noticed upon a first motion.

Campbell J.—Upon the opening this matter I thought it strange and was indignant, that the irregularities pointed out by the defendant's counsel should have taken place.

Whatever were the grounds, it now appears those irregularities have been discussed & decided upon for many terms back.

The counsel has referred to a number

1824

Hawkins against Randall.

of authorities, which it was to be supposed he referred to as upon a first application and discussion, but it appears that was not the case. If they are to be considered as furnishing authority for opening and reconsidering matters already discussed and decided upon, they do not apply.

Upon reference to the order in Hilary Term, 3d James 1st—it appears such second discussions cannot be permitted. Were it not for this salutary rule, nothing could be more uncertain than the proceedings and decisions of Courts of Justice. There is also a penalty attached to the breach of the rule, which, as this is the first time it has been attempted to be infringed in this Court, I should not wish to see enforced; but upon any future attempt of the kind, I should.

Chief Justice,—I concur with my brother Campbell, and for the reason given by him, I also consider that the penalty may be dispensed with.

Per Curiam—Application refused.

DOE ON THE DEMISE OF STANSFIELD *against* WHITNEY.

1824

April 30th

Though a probability exists that a defendant in ejectment may have a merits, the court will not necessarily grant a new trial, the verdict in ejectment not being conclusive upon the parties.

This was an ejectment tried at the Assizes for the Midland district.

The facts on the part of the lessor of the plaintiff were, that Daniel Washburn under whom he claimed, being in possession of the premises left this country and went in 18 to the United States where he died, leaving one Short in the possession and charge of the premises.—That Simeon Washburn was his Brother and Heir at Law. That Daniel Washburn being at the time of his death, indebted to the lessors of the plaintiff in a considerable sum, his heir at law, Simeon, by the advice of Counsel, by bargain and sale, transferred the property to them in satisfaction of the debt. This deed it appeared had not been registered until after the commencement of the suit. It further appeared in evidence, that Whitney the defendant, became the tenant in possession by breaking into the premises after the death of D. Washburn, and before any entry had been made by his heir Simeon Washburn; but after the bargain

1824

Doe Dem. Mansfield against Whitney.

and sale made by him to the lessors of the plaintiff. The defendant's claim to the premises was under a mortgage made by Daniel Washburn to him, and which had become forfeited. The defendant's Attorney under an impression that it was necessary to make out his title by proving the original grant from the crown, and which as well as subsequent conveyances to Daniel Washburn, he presumed would have been proved by the plaintiff's lessor, to support his own title, had not given the deed of mortgage in evidence, and the Jury had in consequence found for the plaintiff.

Macaulay, had in a former term obtained a rule nisi to set aside the verdict and to grant a new trial on the ground—First, that the lessor of the plaintiff should have commenced the proof of his [illegible] producing the original grant fr[illegible] crown. —Secondly, that the bargain and sale made by Simeon Washburn to the plaintiff's lessors, was void—1st, as being without consideration & *nudum pactum*, it being made upon a general presumption that the lands in the hands of the heir were liable to the ancestor's simple contract debts, which was not true as a general proposi-

1824

Dec. Dem. Stanfield against Whitney.

tion, but only *sub modo*.—2dly, the consideration not being expressed in the deed to be pecuniary.—3dly, as not being registered before action brought.—4thly, for uncertainty as not being descriptive of any particular lands.—5thly, because the Heir Simeon Washburn, could not make a title before entry upon the lands, his estate being abated by the entry of Whitney.

Thirdly, on the ground of mistake in the defendant's counsel, which originated in a surprise, the plaintiff's Attorney having given notice to produce title deeds which he did not afterwards call for, on a presumption of his doing which the defendant did not come prepared to prove them.

Fourthly, on the ground of merits, the defendant having a clear title under his mortgage.

Robinson, Attorney General, now shewed cause. If Justice has been done the court will not grant a new trial upon antiquated technical points of law, as abatement, disseisin &c. especially when they were not moved or reserved at the

1824

Doe. Dem Stansfield against Whitney.

trial.* The only reservations were whether the plaintiff's lessors should not have gone back with his title to the King's deed, and whether the bargain and sale to him from the heir, was not void for want of consideration.

As to the first, it is clearly laid down as well by Mr. J. Buller† as in Phillips' evidence, that it is sufficient to commence the proof of a title by the death and seisin of the ancestor; as to the second objection, the want of consideration, I consider that it was good and valuable, a debt due from the ancestor to the plaintiff's lessor the bargainee, and which debt the lands of Simeon Washburn, the heir of the bargainor, were chargeable with under the 5 Geo. 2d. The advantages the plaintiff has obtained by this verdict are no other than he should have had without it; namely, being a defendant instead of a plaintiff, for the defendant if entitled should have brought his action and not have forced Stansfield to become plaintiff by a forcible entry. The reasons for refusing new trials upon

* 2 Trust, 217.
2 T. R. 4 Edmonson v. Machell.
1 Bos. & Pul. 338. Cox v. Kitchen.
† Bull N. P. 103.

1824

Doe. Dem Stansfield against Whitney.

technical objections apply more strongly to cases of ejectment than to any others as the judgment is not conclusive as laid down in 10 Mod 202.

Macauley contra, The cases urged by the Attorney General would apply in this, if, as in those, a fair trial had been had; but the defendant, in fact, has had no trial at all.

His Attorney received notice from the plaintiff's attorney, to produce the original title deeds, from which he presumed they would be called for by the plaintiff's counsel, and did not therefore bring witnesses to prove them; but the plaintiff, instead of beginning his title with these deeds, commenced by the death and seizin of Daniel Washburn, the counsel for the defendant erroneously supposing, that it was necessary for the plaintiff to commence his title by proving these original deeds, and being unprepared with such proof gave up his case, and the defendant was thereby, in fact, deprived of a trial. The entry of Whitney has also been urged as an objection; if it was an independent fact, it might make against him; but coupled as it was with a good title and the possession of deeds, it was

1824

Doe, Dem. Bennett against Whitney.

a fair assertion of his right. If the several objections to the plaintiff's title had been stated in a case, or upon a special verdict, I might without doubt have gone into them all; and I conceive I may do so if they appear upon the judges notes.

There are many cases of new trials being granted upon grounds not moved at the trial where the ends of justice required it.

In Sutton against Mitchell* a new trial was granted the defendant upon grounds, which by the mistake of his counsel, were not noticed at the trial; and in D'Aguilar against Tobin† the court granted a new trial on account of the mistake even of a witness.

In the cases of Cox against Kitchen, Edmonson against Machell, and other authorities cited, the court refused to grant new trials upon points not reserved at the trial, because they considered that justice had been done, or that the proposed defences were not conscientious; but the merits here are with the defendant, he holds a mortgage for which he paid his money long before the plaintiff took

* 1 T. R. 18. † 2 Black. 901.

1824

Doe. Dem. Stansfield against Whitney.

his deed, the very taking which, under such circumstances, subjects to the charge of buying up a pretended title.

I conceive that the lessor of the plaintiff should have commenced his title with the original grant from the crown. The titles here are not upon the same footing with those in England—there a tenant is presumed to be in, with the consent of the Lord of the fee, but here all the lands having been in the crown within sixty years, that presumption fails, and a grant from the crown should be proved. On this ground the plaintiff, I conceive, should have been nonsuited. Short's possession too, was not such as to be that of D. Washburn's; he should have been a tenant paying rent, whereas he was a mere casual occupant not recognised by the law.

To make the consideration for the bargain & sale to plaintiff, good & valuable, it should have been shewn that the lands in possession of Daniel Washburn's heir, were, in fact, liable to his debts, and further that the consideration was a pecuniary one, as laid down in Cruises digest, vol 4, and also in the 8th report.

1824

Doe, Dem. Bousfield against Whitney.

[*Boulton J.*—You may shew a pecuniary, consideration, satisfied in Oxen or other valuable.]

This instrument is void too I contend for uncertainty; it describes no land in particular, but all the land Daniel Washburn died possessed of. I conceive it was void too for want of registry. The English statutes appoint a time within which deeds must be enrolled, and after registry the title is retrospective; but here no time is appointed, from whence it may be fairly concluded, that the title is not complete until the deed is registered. This instrument indeed could not be properly registered, for it mentions no county in which the lands lie.

Upon these grounds of objection to the title of the lessor of the plaintiff.

Upon that of merits which is clearly with the defendant, and upon the broad principle laid down by Mr. Justice Buller in Eatwick against Cailland,* "that upon the application for a new trial the only question is, whether under all the circumstances of the case, the verdict be or be not according to the justice of the case,"

* 3 T. R. 423.

1824

Doe. Dem. Stansfield against Whitney.

I conceive that the defendant is entitled to a new trial.

Robinson, Attorney General, in reply. It is important to the real justice of this case that the defendant should not have an opportunity of bringing forward the antiquated doctrine of abatement disseisin, &c. and therefore I contend that these points not having been moved at the trial should not now be taken into consideration.

Were this a case in which justice could not be done without considering them, I might not perhaps object to their consideration; but it is not so. Injustice would take place by allowing the defendant to take advantage of his own wrong in making a forcible entry. Justice is not his object, but he wishes to meet us with defects in our title. The seizin of D. Washburn is sufficiently substantiated. It is not necessary for a person to be confined to his house to continue the possession of it; if he has fifty houses he may move from the one to the other and continue his possession by having an agent or servant, or even by keeping a key.—There is no occasion for a person claim-

1824

Geo. Dunn Stratford against Whitney.

ing title to go back farther than to the death or seizin of the ancestor here, more than in England. He is not obliged by commencing his proof beyond that, to subject himself to make slips or breaches in the chain of title.

The ancestor's dying seized makes the heir's title *prima facie* good, and it is for the defendant to shew a better title.

The objection to want of registering has been taken from a supposed anology between our registry acts, and the English statutes for the enrollment of deeds of bargain & sale; no such analogy in fact exists; there are registry acts in England as well as here, upon the same principle and for the same purposes; namely, that of giving notice to subsequent purchasers, but not to substantiate or confirm the title.

The consideration for the plaintiff's deed, was the best possible; there was a just debt due by the ancestor, to which the lands were liable under the 5th Geo. 2d. The consideration may be money or moneys worth, as laid down by my Lord Coke, who says, that a bargainee may aver money or other valuables as the consideration. If the defendant has

merits, he, in his turn, may bring an ejectment, which he ought to have done at first.

1824

Doe Dem. Stansfield against Whitney.

Chief Justice,—The points urged by the counsel for the defendant, appear to be worthy of consideration; but the trial had, not being conclusive, as the defendant has an opportunity of bringing forward any merits he may have, upon an ejectment to be brought by himself, the Court are of opinion that the rule nisi should be discharged.

Per curiam—Rule discharged.

1st. May.

JOHNSON *against* SMADIS.

A defendant may upon the affidavit required for the arrest of the persons of debtors issue an execution against the body of a plaintiff, who has suffered a judgment of non. pros.

In this case the defendant had obtained a Judgment of *non pros* and had issued a ca: sa: upon it.

Boulton, Solicitor General, moved to set the same aside, on the ground, that this writ did not lie for a defendant, the words of the statute authorising it being confined to plaintiffs, and not sufficiently general to embrace defendants. They only point out the affidavit to be made by plaintiffs.

1824

Johnson opposed Bundle.

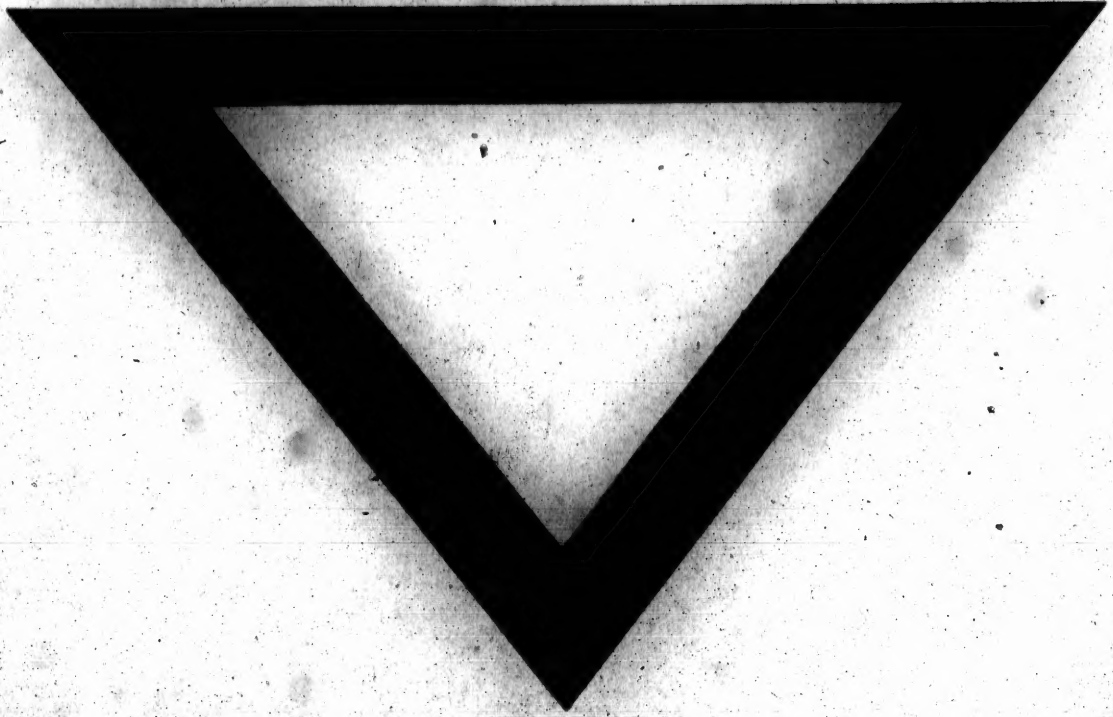
Chief Justice.—The costs in this case have become a debt, & I consider a defendant entitled to the same remedy a plaintiff might have had if he had recovered.

Campbell J.—The case here too turns upon a fraud, which must have been stated in the affidavit.

Per Curiam—Application refused.

A person may be admitted an Attorney of this Court upon his own Affidavit of service where the Attorney to whom he was articled is absent from the Province

EXPARTE RADENHURST.

Mr. Thomas Radenhurst applied this term to be admmitted an Attorney.

Mr. Ridout with whom he had been articled being absent from the province, the Court admitted Mr. Radenhurst upon his own affidavit of service for five years without the usual certificate.